Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

August 2005

Successful defendant need not apportion costs between plaintiffs. Several plaintiffs asserted their individual claims for defects in their houses in a single suit. The defendant prevailed and filed a single cost bill. The Court of Appeal rejected plaintiffs' claim that defendant should have apportioned the costs between the plaintiffs. But court remanded the case to the trial court to review the cost bill; the trial court had failed to conduct an itemized review of the cost bill and was under a duty to do so. *Acosta v. SI Corp.* (Cal. App. Second Dist., Div. 4; June 6, 2005) 129 Cal.App.4th 1370, [2005 DJDAR 6595].

Specific requirements of statute must be met before court may declare a party to be a vexatious litigant. The statutory scheme for declaring parties appearing in pro per to be vexatious litigants contains three separate sets of criteria. But before such parties may be declared vexatious litigants, they must meet all of the criteria of at least one of these sets. In determining whether the litigant is vexatious, the court may not "mix and match" criteria from the separate qualifying sets. *Holcomb v. U. S. Bank National Association* (Cal. App. Fourth Dist., Div. 3; June 8, 2005) 129 Cal.App.4th 1494, [2005 DJDAR 6716].

Expert witnesses may seek equitable contribution from lawyers who represented their mutual client. After plaintiffs lost a motion for summary judgment, they sued the expert who was used to oppose the motion, alleging that the expert's inadequate degree of expertise resulted in their losing their case. After the experts settled, they were permitted to sue the lawyers who had represented plaintiffs in the underlying action for equitable indemnity to apportion the damages. *Forensis Group, Inc. v. Frantz-Townsend & Foldenauer* (Cal. App. Fourth Dist., Div. 1; June 9, 2005) 130 Cal.App.4th 14, [2005 DJDAR 6757].

Party may not renew summary judgment motion without new facts or changed law. More than a year after a court had denied defendants' motion for summary judgment, some of the defendants again moved for summary judgment on the same grounds. The court granted the second motion. The California Supreme Court reversed, holding that, a party is prohibited from making a second motion not based on either new facts or new law. (*Code Civ. Proc.* § 437c, subd. (f)(2).)

However, the court recognized that the trial court has inherent power, derived from the California Constitution, to reconsider previous interim orders on its own motion, as long as it gives the parties notice that it may do so and a reasonable opportunity to litigate the question. And plaintiff's victory may have been a hollow one, because the court recognized that, on remand, the trial court could again reconsider the initial denial of summary judgment, as long as it did so on its own motion. *Le Francois v. Goel* (Cal.Supr.Ct.; June 9, 2005) 35 Cal.4th 1094, [2005 DJDAR 6743].

Note: The distinction drawn by the Supreme Court may be one that does not make a difference. It is clear that once summary judgment is denied a party may not renew the motion absent new facts or changed law. But what is to prevent a party from filing a request that the court reconsider the ruling on its own motion?

Not all post-judgment orders are appealable. With exceptions, pre-judgment orders of a trial court are not appealable. Any issues concerning such orders must be dealt with on an appeal from the judgment. But, *California Code of Civil Procedure* § 904.1, subd. (a) (2) provides that an order after judgment is appealable. Nevertheless, in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651, [863 P.2d 179; 25 Cal.Rptr.2d 109], our Supreme Court held that, before a post-judgment order is appealable two additional requirements must be met: (1) the issues raised by the appeal from the order must be different from those arising from an appeal from the judgment and (2) the order must either affect the judgment or relate to it by enforcing it or

Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, click here.

Litigation Section Events

2006 Annual Trial Symposium & Litigation Section Retreat

April 21–23, 2006
Silverado Country Club and Resort
Napa Valley, CA

staying its execution. Relying on *Lakin*, the Court of Appeal held that an order compelling post-judgment discovery in aid of execution was not appealable. *Roden v. Amerisourcebergen Corp.* (Cal. App. Fourth Dist., Div. 3; June 14, 2005) 130 Cal.App.4th 211, [2005 DJDAR 7027].

When a lawyer is disbarred, a real estate license may not be an option. Bernard Berg was disbarred because of excessive and fraudulent billing. He decided a career in real estate might give him a new start. But the California Department of Real Estate refused to issue a license based on *Bus. & Prof. Code* § 10177, which provides for the denial of a license under certain circumstances if a license issued by another agency has been revoked. Among other assertions, Berg claimed that his disbarment proceedings had been unfair and sought to relitigate the merits of those proceedings. The Court of Appeal held that, under principles of collateral estoppel, the decree in the disbarment proceedings could not be attacked and affirmed the judgment denying Berg his real estate license. *Berg v. Davi* (Cal. App. Third Dist.; June 14, 2005) 130 Cal.App.4th 223, [2005 DJDAR 7024].

Court is not bound by its tentative decision. Until entry of judgment, the court may vacate or change a previously announced verdict as it sees fit. *Horning v. Shilberg* (Cal. App. Fourth Dist., Div. 1; June 14, 2005) 130 Cal.App.4th 197, [2005 DJDAR 7031].

California Supreme Court offers further guidance on punitive damage caps. In two new cases, our Supreme Court has dealt with limits on punitive damages, after the United States Supreme Court imposed such limits in *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, [123 S.Ct. 1513; 155 L.Ed.2d 585] and *BMW of North America v. Gore* (1996) 517 U.S. 559,[116 S.Ct. 1589; 134 L.Ed.2d 809]. Both of the California opinions were written by Justice Werdegar. In one of them the Court of Appeal's reduction in the amount of punitive damages awarded was held to have been too drastic. In the other, the Supreme Court reduced the amount of punitive damages that had been approved by the Court of Appeal.

In *Johnson v. Ford Motor Co.* (Cal.Supr.Ct.; June 16, 2005) 35 Cal.4th 1191, [2005 DJDAR 7101] the court held that the Court of Appeal's reduction in punitive damages to three times the amount of actual damages was too much of a reduction because of the reprehensibility of the defendant's conduct. The court seemed to approve a more flexible standard than a "single digit multiplier" maximum that many had derived from the U.S. Supreme Court's decision in State Farm. In *Simon v. San Paolo U.S. Holding Co., Inc.* (Cal.Supr.Ct.; June 16, 2005) 35 Cal.4th 1159, [2005 DJDAR 7091] the court reversed a punitive damage award of $1,700,000, based on actual damages of $5,000, holding it excessive and in violation of due process. The court reduced the award to $50,000.

Note: These two cases must be read and analyzed in any case where punitive damages are sought. They establish the criteria now applicable for determining the maximum amount of punitive damages in California under the earlier U.S Supreme Court decisions.

Operators of roller coasters are "common carriers." *Civil Code* § 2100 imposes a duty on common carriers to one of "utmost care and diligence," rather than mere reasonable care. This higher duty of care applies to operators of roller coasters in an amusement park. *Gomez v. Sup.Ct. (The Walt Disney Co.)* (Cal.Supr.Ct.; June 16, 2005) 35 Cal.4th 1125, [2005 DJDAR 7111].

Participate In The Discussion Board Excitement

See what all the excitement is about! We are having great participation on our State Bar Litigation Section Bulletin Board. Join in on the exciting discussions and post your own issues for discussion.

If you have any comments, ideas, or criticisms about any of the new cases in this month's issue of Litigation Update, please share them with other members on our website's discussion board.

Our Board is quickly becoming "The Place" for litigators to air issues all of us are dealing with. Go to: http://members.calbar.ca.gov/mb/ShowForum.aspx?ForumID=13 to explore the new bulletin board feature—just another benefit of Litigation Section membership.

Remember to first fill out the Member Profile to get to the Discussion Board!

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